

“WAIVER BY CONDUCT”: ANOTHER VIEW

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1. Introduction

This article offers some observations on the “waiver by conduct” doctrine proposed by John Fedders and three of his colleagues. The doctrine attempts to resolve the difficult issues resulting from the conflict between U.S. prosecutorial needs for disclosure, when insider trading on its securities markets is suspected, and requirements of secrecy and blocking laws of foreign nations.

Mr. Fedders proposes U.S. legislation directed at investors who trade in U.S. securities markets through foreign financial institutions. The proposal would deem these investors to have “waived”, by the “conduct” of their trading activity, any right to claim protection under a foreign country’s secrecy or blocking laws. Presumably, this standard of “waiver by conduct” is a U.S. standard. It does not take into account what the applicable law of a foreign country might view as constituting a waiver.

This disregard for foreign law seems to be justified by the claim that the “conduct” at issue, namely trading in a U.S. securities market, provides a proper U.S. jurisdictional means for the application of U.S. law [1]. Mr. Fedders argues that, under this doctrine, the “double standard” in securities trading will be eliminated: no longer would persons trading through a domestic broker have to give that broker certain identifying information, while persons trading through a foreign institution avail themselves of the protection of secrecy laws.

It is not the purpose of this article to dispute the claim that securities trading abuses, like the misuse of nonpublic information, do occur and are sometimes aided by the secrecy or blocking laws of a foreign country. Nor is its purpose to dispute the claim that trading on inside information is an abuse which is the proper concern of the Securities and Exchange Commission (SEC). Rather, this article submits that Mr. Fedders’ panacea for the problem ignores the sovereign interests of other nations in the enactment of their own

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laws. As such, it is neither constructive to the cause of comity among nations nor even necessary to solve the problem.

Mr. Fedders' proposal is disappointing given his diplomatic initiatives which were instrumental in reaching the 1982 Memorandum of Understanding [2] with the Swiss government, and the accompanying Agreement XVI concluded by the members of the Swiss Bankers' Association [3]. It is even more disappointing coming at a time when representatives of the Department of State have been publicly supporting a diplomatic solution based on treaties and conventions with foreign countries. Furthermore, the Department of Justice in 1983 issued a new guideline to all its U.S. Attorneys requiring that alternative treaty methods of obtaining information should be fully explored before action is taken to enforce subpoenas and impose sanctions for noncompliance in U.S. courts [4].

2. The "double standard" problem

The major thrust of the "double standard", as perceived by Mr. Fedders, is that a person who trades in U.S. securities through an American broker-dealer must disclose his identity to the brokerage firm which, when properly requested by the SEC, must disclose that information. At present this is not true of transactions effected through a financial institution subject to a foreign country's secrecy laws. Even if that foreign financial institution effects a transaction through an American broker-dealer, the only customer known to the broker-dealer is likely to be the foreign financial institution.

A simpler approach towards removing this double standard is to require parity in the identification of beneficial owners effecting securities trades in the U.S. market, regardless of the place where they initiated the trade or the means used. As noted below, this approach may have adverse economic consequences to the United States; but, theoretically at least, it has no impact on a foreign country's secrecy or blocking laws since the required information is supplied in the United States as part of the transaction itself.

Foreign investors, choosing to trade on a U.S. exchange through a financial institution, would be alerted to this requirement, thus giving them the opportunity to determine *a priori* whether they want to trade on the U.S. market. Even then, however, it is still unlikely that many foreign bank customers would be identified because foreign financial institutions, acting as brokers registered on their own country's stock exchange, maintain an inventory of U.S. securities for purchase and sale as principals. This fact, together with the presence of a secondary European market, means that transactions of foreign bank customers may never reach the U.S. market.

A similar approach was proposed by the SEC in 1976 and 1977 when it put forth for comment an amendment to SEC Rule 17a-3(a) [5]. The amendment,

which was addressed specifically to the problem of trading through a financial institution protected by a foreign country's secrecy laws, would have required every broker to maintain a record of every beneficial owner of a cash or margin account, or else obtain assurances that such information would be disclosed upon the SEC's request. Yet, it was never adopted, perhaps for reasons not too dissimilar to those thwarting a 1970 attempt by the SEC to add a new section to the Securities Exchange Act of 1934. That proposed addition would have given the SEC authority to issue regulations prohibiting U.S. broker-dealers from accepting securities orders from foreign financial institutions, unless the beneficial owners were identified or at least certified as being non-American [6]. The U.S. Departments of State and Treasury argued that the amendment would have a deleterious effect on the balance of payments of the United States, shifting such securities transactions from the U.S. markets to exchanges abroad [7]. As a consequence, the amendment was not enacted [8].

3. The doctrine of "waiver by conduct"

The ability of investors to trade U.S. securities on foreign exchanges has dramatically increased in recent years. Thus, it would seem that the concerns expressed by the Departments of State and Treasury in 1970 can only be greater today, making Mr. Fedders' proposal even more objectionable than the SEC's earlier proposed amendment.

Furthermore, the doctrine of "waiver by conduct" is far more intrusive on foreign sovereignty than the 1970 proposed amendment. Then, the SEC sought only the disclosure of the name and address of the beneficial owner by the U.S. broker. As such, it would not have obtained any more information about a foreign investor than it could obtain about a domestic one. Also, since the information would not have been requested from institutions abroad, foreign secrecy or blocking laws would not have been even applicable. Therefore, this earlier proposal better preserved a foreign country's sovereign interest than does Mr. Fedders' proposal.

By going beyond these earlier proposals, the "waiver by conduct" doctrine creates significant jurisdictional and international comity problems, without resolving the practical problem of enforceability, as the following observations illustrate. First, U.S. law does not confer the right of secrecy; it is acquired under the law of a foreign nation. Consequently, under normal application of conflict of laws principles, all aspects of that foreign right must be governed by that foreign sovereign's law. Mr. Fedders' proposal disregards the mandate of sovereign law by adopting a U.S.-defined concept of "waiver".

Second, the request for information made possible by the "waiver" would not be made to a U.S. broker-dealer. Instead, subsequent to the securities

transaction, the request would be made to a foreign financial institution which may not be subject to U.S. jurisdiction. Since the foreign institution must operate under the laws of its own country, whose courts may not recognize "waiver by conduct", a clash of competing sovereign interests becomes more likely.

Third, information sought under the "waiver by conduct" doctrine is far more extensive than the mere name and address of the beneficial owner. According to Mr. Fedders' proposal, trading in U.S. securities would waive a foreign country's secrecy laws not only with respect to information about a specific transaction performed through a foreign bank account, but to information concerning the entire bank account in question. Thus, Mr. Fedders would use the jurisdictional nexus of a single transaction in the United States to force foreign investors to disclose their entire financial dealings, many of which may have no relationship to the United States.

Fourth, the presence of alternative securities markets abroad, over which the SEC has no jurisdiction, makes the waiver by conduct approach subject to the same criticisms that defeated the earlier proposed legislation. While a market for securities such as options in the shares of U.S. companies is generally not available anywhere but in the United States, common stocks of many U.S. listed companies are traded as a secondary market on foreign exchanges. Moreover, the inventories of large financial institutions may well be able to accommodate many of the securities trading requests of its customers. Such trades, although having no involvement with the U.S. markets, may nevertheless be a vehicle for the very trading abuses with which Mr. Fedders professes concern. Rather than correct the problem, "waiver by conduct" drives it more effectively offshore, to the financial detriment of the U.S. securities industry and to the frustration of the watchful U.S. prosecutor.

Fifth, and as Mr. Fedders himself recognizes [9], the doctrine of waiver can only work if the right to privacy or secrecy is one that can be waived. Thus, for example, the "waiver by conduct" approach will not be effective in cases involving blocking statutes which cannot normally be waived or affected by private parties. For this reason, the recent increased use of blocking statutes by foreign sovereigns reacting to the expanded U.S. precepts of extraterritorial jurisdiction should make it clear that a dialogue among affected nations would be more fruitful than unilateral action.

Finally, there is no assurance that Mr. Fedders' approach will even work where, as is often the case, the request for information is made, or the subpoena be served upon, a foreign financial institution. Since the SEC does not usually know at first hand the name of the beneficial owner concerned, it frequently turns to the brokerage firm which directs it to the foreign financial institution involved in the transaction. Where that institution is a brokerage firm replenishing its own inventory of securities, it is the beneficial owner. Only where the institution is acting as agent in effecting the trade will the

customer be the beneficial owner and the "waiver by conduct" issue be faced. In such cases, if the institution is doing business in the United States and is thereby subject to its jurisdiction, it will be served with a subpoena requiring it to respond to the SEC's request. The situation may be complicated by the fact that the beneficial owner may not agree with the concept of waiver or that the law under which the right of secrecy was conferred may not recognize the doctrine of "waiver by conduct". In these cases, the foreign financial institution may be forced to resist and litigate against the enforcement of the subpoena. This creates a situation similar to those in *BSI* [10] and *Santa Fe* [11].

As to those foreign institutions not doing business in the United States, the jurisdictional nexus for subpoena service will be marginal at best, and the SEC will be faced with the additional difficulty of trying to serve a subpoena outside the United States. Section 21(b) of the Securities Exchange Act of 1934, which authorizes investigatory agency subpoenas, only requires the attendance of witnesses or the production of records "from any place in the United States or any state at any designated place of hearing" [12]. Furthermore, the narrower principles of compulsory jurisdiction applicable to subpoenas, as opposed to informational jurisdiction which is applicable to summonses [13], suggest that even if the SEC is armed with the "waiver by conduct" doctrine, it may still be unable to obtain the identity of the person from whom the waiver is compelled [14].

The net result of this proposal is to avoid investments through a foreign financial institution which acts as an agent, and encourage those where it acts as a principal in the transaction. Investments through companies not doing business in the United States will also become more desirable. Alternatively, investors may well learn to effectuate transactions through multiple tiers of financial institutions, at least one of which is not subject to personal jurisdiction in the United States. Conversely, "waiver by conduct" may well occasion an increase in trading on foreign securities exchanges. It may cause some financial institutions to rethink their business decisions concerning the opening of branch offices in the United States, and to structure their business in such a way as to avoid this country's personal jurisdiction. All of this may be detrimental to the United States' desire to facilitate foreign investments and the infusion of foreign capital.

4. The diplomatic solution

The answer to this problem must be found through diplomacy. With a proper exchange of views and a balancing of competing sovereign interests, representatives of both countries can find mutually agreeable solutions. The Swiss-American Treaty on Mutual Assistance [15] and the Hague Convention

on the Taking of Evidence Abroad in Civil or Commercial Matters [16] are, of course, excellent examples of this mutuality of interest. The 1982 Memorandum of Understanding between the United States and Switzerland and its accompanying Agreement XVI among members of the Swiss Bankers' Association is another. That agreement, the subject of lengthy negotiations between representatives of both governments and of the Swiss Bankers' Association, established a clearly defined procedure for allowing the exchange of certain information when improper insider trading is thought to have occurred. Yet the procedures still respect and protect the substantive and procedural rights given by the Swiss secrecy laws.

Mr. Fedders argues that the Memorandum of Understanding and Agreement XVI are a precedent for the "waiver by conduct" approach [17]. This claim misses the mark because it disregards the principles of comity between sovereign nations which was the very predicate of the Memorandum of Understanding.

There are at least four important differences between the Memorandum of Understanding and the "waiver by conduct" approach. First, "waiver by conduct" is a unilateral U.S. approach which recognizes no right under the law of the other country. By contrast, the Memorandum of Understanding, which was the result of mutual negotiation and agreement between countries, respects the laws of both countries.

Second, "waiver by conduct" invades completely the privacy of a foreign bank account with respect to all transactions past, present, or future. The Memorandum of Understanding and Agreement XVI contemplate that only specific, limited information about the securities transaction in question be disclosed.

Third, "waiver by conduct" provides no minimum standards of probable cause to investigate and seek disclosure. The very act of trading implies the waiver. By contrast, the Memorandum of Understanding and Agreement XVI require a threshold test as to the propriety of the request.

Fourth, "waiver by conduct" allows the investigation to be entirely in U.S. hands without giving any rights to the investor. The Memorandum of Understanding and Agreement XVI establish a tribunal in Switzerland to determine, after hearing any appropriate objections from the customer, whether the SEC's request should be honored.

To the extent that Mr. Fedders is serious in arguing that the "waiver by conduct" principle "ought to be recognized even in the absence of legislation" [18], he raises a further disturbing note. Proposing specific legislative enactments would provide Congress with a fuller analysis of the international, economic, and practical issues that would be affected by this approach. Questions surrounding the 1970 proposal can be properly analyzed anew in the context of today's financial and economic climate, rather than in one reflecting the needs of a solitary prosecutor [19]. These opportunities, however, will be

seriously impaired if the matter is left to the judicial process. The right of secrecy is a right granted by foreign law. Leaving to the U.S. judge the decision concerning the propriety of waiving that right can be problematic, since the decision will frequently be based only upon U.S. legal precepts as presented by U.S. prosecutors interested only in advancing their own investigation.

5. Conclusion

Mr. Fedders' article has already provoked lively comment both here and abroad. If Mr. Fedders meant by this article to advance an academic discussion of his overall enforcement problems and to present "waiver by conduct" as a "big stick" alternative approach to negotiation with representatives of other countries, he is to be commended. No doubt negotiation with respect to the problems involved in insider trading will be prodded by a concern among affected foreign nations for the damage to be done by a unilateral "waiver by conduct" approach. It may even be that, as a result of such negotiations, some form of customer identification requirement by U.S. brokers will be found acceptable to both the U.S. and foreign governmental and financial communities.

However, if Mr. Fedders seriously intends to advance "waiver by conduct" as the solution to the problem of abuses in securities trading, then he must realize that he has left the platform of diplomacy he ascended in arriving at the 1982 Memorandum of Understanding with Switzerland. Furthermore, the criticisms which defeated the earlier, more limited 1970 proposal will be effectively raised again and may defeat this proposal as well. Whatever the result of that legislative process, the adverse reaction from foreign governmental and financial centers may cost the United States more in damage to its foreign relations, and in losses to its domestic securities industry, than it will benefit its prosecutorial capability.

Appendix

TO: All United States Attorneys

re: Subpoenas To Obtain Records Located In Foreign Countries For Use
In Criminal Cases

It has been noted that federal prosecutors are with increasing frequency obtaining the issuance of grand jury and trial subpoenas *duces tecum* for the production of banking, financial, and commercial records which are stored within a foreign country. Typically, such subpoenas are served on a United States based entity, such as a bank or business enterprise, which maintains an

office in the foreign country where the subpoenaed records are located. Typically, too, the subpoenaed records are "protected" by the bank and/or commercial secrecy laws of the foreign country.

Two recent court decisions upholding the use of such subpoenas, *In Re Grand Jury Proceedings Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982), *cert. den.*, 103 S.Ct. 3086 (1983) and *In Re Grand Jury Subpoena Directed to Marc Rich & Company, A.G.*, 707 F.2d 663 (2 Cir. 1983), *cert. den.* ___ U.S. ___ (1983), have dramatically improved the potential for law enforcement access to the records of foreign bank accounts and business transactions used by narcotics traffickers, organized crime figures, and white collar criminals to launder the proceeds of illegal activities or to engage in tax evasion or tax fraud schemes. Another important aspect of these cases is the willingness of the courts to impose substantial daily fines – \$25,000 in *Bank of Nova Scotia* and \$50,000 in *Marc Rich* – to compel compliance with their orders to produce records located in foreign countries.

The *Bank of Nova Scotia* and *Marc Rich* decisions clearly demonstrate that use of a subpoena to obtain foreign records is a powerful weapon which the department will vigorously support in appropriate cases. It should be borne in mind, however, that it is not the only method – or indeed in most cases the most effective, economical or timely one – for obtaining such records. Moreover, since this method involves assertion by the United States of jurisdiction which may be in conflict with the bank or commercial secrecy laws of a foreign country, its uncoordinated use raises various questions of infringement of foreign sovereignty which can seriously damage United States foreign relations and adversely affect other cases under investigation. In this regard, several foreign countries have recently lodged strong protests with both the state and justice departments against the use of such subpoenas. We have rejected these protests and do not intend to relinquish the hard fought gains we have won in this battle, but we do want to seize upon this opportunity to convert these protests into offers of assistance by the countries concerned. It is with this in mind that the following has been promulgated.

In order to assess the magnitude of the potential effect of such subpoenas on our foreign relations, it is essential that the office of international affairs of the criminal division be advised of the status of all such outstanding subpoenas. Accordingly, each United States attorney is requested to provide the criminal division by *immediate return telex* the following data as to each such subpoena:

1. Caption of case or grand jury proceeding.
2. Type of offense involved.
3. Name of person or entity subpoenaed.
4. Type of records subpoenaed.
5. Name of foreign country where records are located.

6. Date of issuance of subpoena.
7. Return date.
8. Whether subpoenaed person or entity is cooperating or is opposing production.
9. Status of current or proposed enforcement proceedings.

In cases where enforcement proceedings are either in process or imminent, the office of international affairs of the criminal division shall be consulted immediately. The office of international affairs shall also be consulted prior to initiation of enforcement proceedings relative to all other outstanding subpoenas.

Finally, effective immediately, any federal prosecutor who plans to seek the issuance of a subpoena for bank, business or commercial records reasonably believed to be in a foreign country is directed to obtain the concurrence of the office of international affairs of the criminal division before taking such action.

The following considerations will be taken into account in determining whether such a subpoena should be authorized:

1. The availability of alternative methods of obtaining the records in a timely manner, such as use of mutual assistance treaties, tax treaties or letters rogatory.
2. The indispensability of the records to the success of the investigation or prosecution.
3. The need to protect against the destruction of records located abroad and to protect the ability to prosecute for contempt or obstruction of justice for such destruction.

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Notes

[1] Mr. Fedders refers to Justice Stevens' concurring opinion in *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977), as possible support for this jurisdictional argument. See Fedders et al. *Waiver by Conduct - A Proposed Response to the Internationalization of the Securities Markets*, 6 J. Comp. Bus. & Cap. Mkt. L. 1, 26 (March 1984) [hereinafter referred to as Fedders article]. Justice Stevens stated that the investment in the stock of a foreign corporation alone may be a sufficient basis for foreign jurisdiction because the unusual nature of the investment makes "it appropriate to require the investor to study the ramifications of his decision". 433 U.S. 186, 218. However, premising U.S. jurisdiction simply upon the nationality of the underlying U.S. corporation is questionable under the majority rationale in *Shaffer*, as well as under other cases. See, e.g., *Rush v. Savchuk*, 444 U.S. 320 (1980); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). These cases imply that the "waiver by conduct" jurisdictional nexus requires at least an actual purchase or sales transaction intentionally effected upon a U.S. securities market.

[2] Switzerland-United States: Memorandum of Understanding to Establish Mutually Acceptable Means for Improving International Law Enforcement Cooperation in the Field of Insider Trading (1982), reprinted in 22 Int'l Legal Mat. No. 1 at 1.

[3] Agreement XVI of the Swiss Bankers' Association with Regard to the Handling of Requests for Information from the Securities and Exchange Commission of the United States on the Subject of Misuse of Inside Information, reprinted in 22 Int'l Legal Mat. No. 1 at 7.

[4] The text of this guideline, issued November 17, 1983, is reprinted as an appendix to this article.

[5] Proposed Rule 17a-3(a)(9), C.F.R. § 240.17a-3(a)(9), Fed. Sec. L. Rep. (CCH) ¶26,154 provides in full:

(a) Every member of a national securities exchange who transacts a business in securities directly with others than members of a national securities exchange, and every broker or dealer who transacts a business in securities through the medium of any such member, and every broker or dealer registered pursuant to Section 15 of the Securities Exchange Act of 1934, as amended, shall make and keep current the following books and records relating to his business:

...

(9) A record in respect to each cash and margin account with such a member, broker, or dealer containing the name and address of each beneficial owner of such account and in the case of a margin account, the signature of such owner; *Provided*, That in the case of a joint account or an amount [sic] other than an account of a natural person, such records are required only in respect of the person or persons authorized to transact business for such account if such persons undertake to furnish, at the request of the Commission, the name and address of each beneficial owner of such account.

[6] The relevant portion of that amendment provides:

(a) Whenever required in any particular case or class of transactions by such rules, regulations, or orders as the Commission may adopt as necessary or appropriate in the public interest, no person engaged in the business of effecting transactions in securities for the accounts of others, or of buying and selling securities for his own account through a broker or otherwise, shall knowingly make use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange, to execute or cause to be executed, or to effect or cause to be effected, directly or indirectly, any transaction in domestic security with any foreign financial

agency... unless at or before the time of transaction—

(1) such foreign financial agency has disclosed to such person the identity of all persons having any beneficial interest in such transaction; or

(2) such person has accepted in good faith a certification from such foreign financial agency that no citizen or resident of the United States has any beneficial interest in the transaction to be effected.

(b) No citizen or resident of the United States shall, directly or indirectly, purchase or sell or arrange for the purchase or sale of any domestic security, from or through a foreign financial agency, unless such citizen or resident—

(1) gives a written authorization to such agency to disclose his identity to any person (A) engaged in the business of effecting transactions in securities for the account of others or for his own account through any means, instrumentality, or facility referred to in subsection (a), and (B) the services of which are utilized in connection with such purchase or sale; and

(2) files periodic reports with the Commission disclosing the details of any such purchase or sale in accordance with such regulations as the Commission may prescribe.

[7] The State Department's Assistant Secretary for Congressional Relations wrote:

It is our concern that the establishment of title IV certification would not deter anyone wishing to conceal purchases of U.S. securities. That person could either conduct such transactions by deception or with collaboration of willing foreign agencies. A major secondary market for U.S. securities exists abroad which can be augmented in complete legality by securities arbitrageurs transferring securities from the United States to exploit any premium on securities which might develop in that secondary market. Persons who wish to conceal could easily purchase U.S. securities in this secondary market. Without institution of virtually complete exchange controls on capital transactions, severely limiting convertibility of the dollar and jeopardizing its international value, there would not appear to be any practical way of closing this type of loophole. Nor, as the Treasury suggests, would it be necessary to do so because of other provisions providing it adequate information and enforcement capabilities.

16 *Cong. Rec.* 32,632 (1970) (Letter dated August 3, 1970, from David M. Abshire, Assistant Secretary for Congressional Relations, Department of State).

Treasury Secretary Kennedy wrote:

We strongly urge the deletion of title IV of S. 3678. The amendments approved by the Senate committee do not eliminate the aspects of this title detrimental to the U.S. balance of payments and the free international flow of securities and capital. Nor do they improve the reliability of information to be provided under this title. Title IV continues to pose the problem of threatening unwarranted invasions into the privacy that should attend day-to-day financial transactions. As a result, title IV, if enacted, would provide little of value, but would threaten vital interests of the United States.

16 *Cong. Rec.* 32632-33 (1970) (Letter dated August 13, 1970, from David Kennedy, Secretary of the Treasury).

[8] 16 *Cong. Rec.* 32626-27 (1970).

[9] See Fedders article, *supra* note 1, at 25.

[10] *SEC v. Banca della Svizzera Italiana*, 92 F.R.D. 111 (S.D.N.Y. 1981).

[11] *SEC v. Certain Unknown Purchasers*, Complaint filed October 26, 1981, in the U.S. District Court for the Southern District of New York (81 Civ. 6553).

[12] 15 U.S.C. § 78u(b); see *SEC v. Zanganeh*, 470 F. Supp. 1307 (D.D.C. 1978). Section 6(b)

of the Commodities Exchange Act, 7 U.S.C. § 15, contains a limiting provision similar to that contained in Section 21(b) of the Securities Exchange Act. In July 1984 the Court of Appeals for the District of Columbia Circuit vacated, for lack of subject-matter jurisdiction, the contempt citation against a foreign national for failure by that foreign national to respond to a CFTC administrative subpoena served on that national in his home country. *CFTC v. Nahas*, 738 F.2d 487 (D.C. Cir. 1984). The court also noted that enforcement of the subpoena would constitute the exercise of the sovereignty of the United States within the territory of another sovereign in violation of international law.

[13] See, e.g. *CFTC v. Nahas*, *id.*; *F.T.C. v. Compagnie de Saint-Gobain-Pont-à-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980).

[14] The Walsh Act, 28 U.S.C. § 1783, which authorizes the service of extraterritorial subpoenas, would in general be of little help to the SEC since that provision only applies to a national or resident of the United States who is in a foreign country. It is not applicable to foreign nationals.

[15] 27 U.S.T. 2019, T.I.A.S. No. 8302. The Swiss Federal Act on International Mutual Assistance in Criminal Matters, effective January 1, 1983, also provides an avenue for obtaining information from Switzerland. For a discussion of the differences between the Swiss-American Treaty on Mutual Assistance and the Swiss Federal Act on International Mutual Assistance, see Friedli, *New Law Helps Lift Veil of Secrecy from Swiss Banking*, Legal Times, Dec. 5, 1983, at 11.

[16] 23 U.S.T. 2555, T.I.A.S. No. 7444.

[17] See Fedders article, *supra* note 1, at 28.

[18] See Fedders article, *supra* note 1, at 26.

[19] In the *BSI* case, Judge Pollack, after many months of delays sought by BSI, granted the SEC request for an order compelling discovery and for sanctions using words somewhat similar to those underlying waiver by conduct:

Whether acting solely as an agent or also as a principal..., BSI invaded American securities markets and profited in some measure thereby. It cannot rely on Swiss nondisclosure to shield this activity.

SEC v. Banca della Svizzera Italiana, 92 F.R.D. at 117 (S.D.N.Y. 1981).

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